IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10555 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANANTA YASHWANTRAO KAHNVILKAR RETIRED EXTENSION OFFICER

Versus

ACCOUNTANT GENERAL

Appearance:

1. Special Civil Application No. 10555 of 1999

MR AR MAJMUDAR for Petitioner No. 1

Ms. Archana Raval, AGP for Respondent No. 1-2

RULE SERVED for Respondent No. 3,5-6

MR MUKESH R SHAH for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 07/08/2003

ORAL JUDGEMENT

Heard learned advocate Mr. Ashish R. Majmudar for the petitioner; Ms. Archana Raval, learned AGP for respondents no.1,2,5 and 6. Learned advocate Mr. M.R.Shah appearing for respondents no.3 and 4 has also been heard.

2. This petition was admitted by this court by issuing rule thereon by order dated 18.1.2000 and the rule was made returnable on 3rd April, 2000. The facts of the present petition, in short, are to the effect that the petitioner retired on attaining the age of superannuation on 31.8.1987. Looking to the sincerity, honesty and there being vacant post of Animal Husbandary Officer and Extension Officer, the DDO was pleased to give petitioner reemployment under Rule 330(B) of the BCSRs initially for a period of six months and thereafter, by extension of six months, three times and, thus, the petitioner worked for two years in all after retirement in view of his reemployment and discharged his duties. All of a sudden, the DDO passed the order dated 30.5.1991, ordering that the amount of Rs.71,362.11 ps. be recovered from the pension and gratuity on the ground that there was no approval accorded by the authority regarding extension/re-employment of the petitioner and accordingly the said amount was recovered from the pension and retiral benefits of the petitioner without affording any opportunity. Page 13 is the order of retirement of the petitioner dated 16.2.1987 which has come into effect from 31.8.1987. Thereafter, on 21.9.1987, the petitioner was re-employed under Rule 330 (B) of the BCSRs with effect from 1.9.1987. Meanwhile, it was directed not to finalize the pension upto 29th February, 1988. Certain conditions were incorporated in the said order but thereafter on 29th February, 1988 again the petitioner was appointed for a further period of six months with effect from 1st September, 1988 on the same terms and conditions and, thereafter, on 19th October, 1988 again order was issued for further extension which came to an end on 31st August, 1989. By order dated 29th September, 1989, it was made clear that after retirement of the petitioner w.e.f. 1st September, 1987 to 31st August, 1989 was given on condition to keep in abeyance the pension of the petitioner and the period of such reemployment shall not be counted for the purpose of pension and his salary during the period was fixed at Rs.2150.00 as basic pay and whatever available allowances. He was, thereafter, relieved from service on 31.8.1989. The petitioner has received two years salary as per order dated 29th September, 1989 and during the period of his re-employment/extension, the petitioner was not paid any amount of pension by the respondents but thereafter, all of a sudden, by order dated 30.5.1991,

the DDO Panchmahals, Godhra passed order to recover the amount of salary of Rs.71,362.11 received by the petitioner during the period of his re-employment/extension from the pension and gratuity of the petitioner. Details thereof have been given in the order dated 31.5.1991 from which retirement benefits, said amount of Rs.71,362.11 received by the petitioner towards salary for the period of his reemployment/extension has been recovered by the respondents. The appeal preferred by the petitioner against such action and order before the appellate authority has also been rejected on the ground that this should be filed only by the member of the panchayat and not by the other employee. That decision has been communicated to the petitioner by letter dated 2nd May, 1992 and, therefore, present petition has been filed challenging the order dated 30.5.1991 and 2nd May, 1992 passed by the Addl. Development Commissioner, Gujarat State, Gandhinagar.

During the course of hearing of this petition, it was submitted by the learned advocate Mr. A.R. Majmudar on behalf of the petitioner that the petitioner is challenging both the orders on the ground that to obtain approval from the State Government by the District Panchayat is the internal affairs of two authorities with which the petitioner is not concerned and in such process, the petitioner should not be made to suffer because the petitioner has worked for the period of his reemployment and has received salaries for such period for the work done by him and in view of that, the authorities are not justified in recovering such amount from the pension and retirement benefits of the petitioner. He also submitted that as per the conditions of his reemployment, the petitioner has not received single pie from the pension amount for the period of his reemployment and the amount received by him towards salary for the said period has been recovered. Thus, the petitioner is the loser on both the counts. He also submitted that after all, for two years, the petitioner had actually worked and received salary even on the basis of the principles of quantum merit, such recovery is illegal and contrary to law. He also submitted that the order of recovery is also bad in law on the ground that before passing such adverse orders to the petitioner, the petitioner has not been given any opportunity whatsoever by the DDO concerned and straightaway order of recovery has been passed. He also submitted that the similar question has been examined by the Division Bench of this Court in the matter of Union of India and others versus Prema Dhama reported in 2000 (4) GLR page 3081.

Therefore, it was submitted that the original order dated 30.5.91 as well as the order made by the appellate authority on 2.5.1992 both are illegal, unjust, improper and contrary to the principles of natural justice. As regards his contention about the violation of the principles of natural justice, he has relied upon the recent decision of the Hon'ble apex court in the matter of CANARA BANK AND OTHERS VS. DEBASIS DAS AND OTHERS reported in 2003 SCC [L& S] 507. Therefore, according to his submission, the petitioner is entitled for the said amount which has been recovered from him wrongly by the respondents contrary to the principles of quantum merit and also contrary to the principles of natural justice. In support of this contention, he has placed reliance on the decision of the Apex Court on the issue of principle of natural justice in case of CANARA BANK AND OTHERS VS. DEBASIS DAS AND OTHERS reported in 2003 SCC [L& S] 507. Therefore, according to him, the petitioner is entitled for the said amount and the same was wrongly and illegally recovered by the respondent and therefore, the petitioner is entitled for the said amount with interest from the respondents.

On the other hand, learned advocate Mr. MR Shah appearing for the respondents no.3/4 has submitted that the district panchayat is having power to grant extension for a period of one year as per rule 330(B) of the Bombay Civil Service Rules but for a period beyond one year, approval from the State Government in that regard is necessary. According to him, such application seeking such approval is pending before the State Government and the State Government has yet not taken any decision on such an application for the further period of extension in favour of the petitioner. He also submitted that the recovery order has been passed by the DDO Godhra District Panchayat on the basis of the receipt of communication from the Accountant General Rajkot in audit note and, therefore, said order of recovery has been passed by the DDO, District Panchayat Godhra. It was, therefore, his submission that the DDO has recovered the amount in question because of the directions issued by the Accountant General, Rajkot in the audit note. Learned AGP Ms. Archana Raval has also submitted that the District Panchayat is having power to grant extension/reemployment for the one year period and for granting extension for a period beyond one year, prior approval from the State Government has not been obtained and, therefore, the ACCOUNTANT GENERAL Rajkot has rightly made remarks in the audit note and the DDO District Panchayat Godhra has rightly recovered the amount in question on the basis of the remarks made by the

ACCOUNTANT GENERAL Rajkot in the Audit Note. She has, however, submitted that if the application for post approval is yet pending before the State Government and the decision has yet not been taken thereon, then, the State Government will certainly consider the same and will pass appropriate order in accordance with law within some reasonable period.

I have considered the submissions made by the learned advocates for the parties. The order dated 30.5.91 has been passed by the DDO concerned ordering for recovery of the amount of salary received by the petitioner from the retirement benefits payable to the petitioner. Said order dated 30.5.91 is having adverse effect against the petitioner and yet no reasonable opportunity has been given to the petitioner by the DDO concerned before passing such an order. It is settled law that any administrative order having adverse consequences in respect of legal right of any person has to be passed only after affording reasonable opportunity to the person as to why such an order should not be made, as per the principles of natural justice. That aspect has recently been examined by the Hon'ble Apex Court in the matter of CANARA BANK AND OTHERS VS. DEBASIS DAS AND OTHERS reported in 2003 SCC [L& S] 507. The observations made by the apex court on the issue of principles of natural justice are reproduced as under:

"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed fro the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

It is further observed that;

"Notice is the first limb of the principle that no one should be condemned unheard. It must be precise and unambiguous. It should apprise the party determinately of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time."

In this case, admittedly, no notice has been given by the respondents before passing order of recovery and before recovering the amount from the retirement benefits of the petitioner and thus, the order in question is contrary to the principles of natural justice and, therefore, in view of the observations made by the apex court in the aforesaid decision, the order in question is liable to be quashed and set aside.

Second aspect is whether the prior approval has been obtained by the district panchayat from the State Government or not is a matter between two authorities and for such things, an employee who has actually worked for the period in question cannot be made to suffer. It is more so when the salary has been calculated without paying any pension to the petitioner because the petitioner has not been paid pension for the said period. The petitioner had actually worked for the said two years and it is not his duty or concern to see as to whether such extension has been granted by the district panchayat after obtaining prior approval from the State Government. The petitioner is not an authority who can examine this aspect while working on the basis of the order made by the District Panchayat. Therefore, since the petitioner had actually worked for a period of two years, he is naturally entitled for the salary for the period for which he had worked on the basis of the principles of quantum merits. This aspect has been examined by the Division Bench of this court in the matter of Union of India versus Prema Dhama reported in 2000(4) GLR page 3081. The relevant observations made by the division bench in the said decision are reproduced as under:

" 8.xxxxx In our opinion, it cannot be said that by passing the impugned orders, the Tribunal has committed any error of law and/or jurisdiction which requires to be corrected by us. It is an admitted fact that both the respondents have actually worked. So far as respondent of special civil application no. 8530 of 1998 is concerned, he had given his correct date of birth and he had not suppressed any fact. He was continued even after the date of superannuation. Reading the guidelines vide letter dated April 28, 1989, a person can be continued after he reaches the age of superannuation. In fact, from the above extracted portion, it is clear that one Ali Mohmed was permitted to work beyond the date of superannuation and his case was treated as re-employment on usual terms and conditions. We, therefore, see no reason to interfere with the order passed by the Tribunal so far as Special Civil Application No. 8530 of 1998 is concerned.

9. Regarding special civil application no. 842 of 1999, it is clear that there the date of birth of the workman was not available. The case of the respondent workman was that his date of birth was July 6, 1937 and not June 7, 1930. But after partition at the time of entry in India, on June 7, 1948, it was mentioned that he was 18 years of age and on that basis, his birth date was entered as June 7, 1930. He joined service on October 25, 1956. Therefore, considering his date of birth to be June 6, 1937 also, he could have entered in railway service in 1957. In the light of these facts and circumstances, if period for which he had actually worked he should not be asked to refund the amount, it cannot be said that no such order could have been passed by the Tribunal.

10. In fairness, we must point out that our attention was also invited by Mr. Yajnik to a recent decision of the Supreme Court in Ramswaroop Masawan v. Municipal Council AIR 1999 SC 705. In that case, the employee was allowed to continue in service after due date of retirement. He was paid salary. The workman, however, wanted pensionary benefits on the basis of actual date of retirement. The High Court held that he would be entitled to get pensionary benefits on the basis of correct date of birth

and his continuance must be treated as re-employment and it would not confer any right to receive pensionary benefits on that basis. When the matter reached the Supreme Court, the Court observed that there was no illegality in the order passed by the High Court."

Looking to the facts of the present petition, periodical extension for a period of two years was granted by the District Panchayat, Godhra in favour of the petitioner. Said extension was not actually demanded by the petitioner and it was also not the case of the District Panchayat, Godhra that such extension was demanded by the petitioner. Therefore, when there was no fault on the part of the petitioner in accepting the extension and actually worked for a period of two years and received salary and not received the amount of pension for a period of two years for which he was, otherwise, entitled to and subsequently to recover the salary of one year period on the ground that the District Panchayat Godhra has not obtained prior approval from the State Government that itself being arbitrary and hit by Article 14 of the Constitution of India. When there is mistake and/or fault on the part of the department while giving or granting extension in favour of an employee and moment when the mistake or fault has been brought to the notice of the authority, then, in such circumstances, whatever benefits have been received by such an employee shall not be recovered from the employee. This view has been taken by the apex court as well as this court and the Punjab High Court in many cases as under:

(1) AIR 1974 SC page 1889 [Divisional Superintendent, Eastern Railway, Dinapur and others v. LN Kashri and others]
(2) AIR 1994 SC page 2480 [Bhagwan Shukla v. Union of India and others]
(3) 1996 (2) GCD page 382 [Savdas Bhovan Julasana versus State of Gujarat & Ors]
(4) 1997 (1) GLR page 793 [Shankerlal Nagardas Patel v. Taluka Development Officer]
(5) LPA No. 578 of 2001 arising out of the order dated 4th April, 2001 in special civil application no. 2196 of 1999.[IC Patel versus Gujarat Housing Board]
(6) 2003 Lab. & Industrial Cases Punjab & Haaryana High Court page 1029 [Ganesha Basti Bathinda v. State of Punjuab and others]
(7) 2003 (1) GLH page 697 [MM Patel versus State of Gujarat]

In view of the above decisions of the apex court, this court and the Punjab High Court, in such an event, such recovery from the employee is not permissible as otherwise, it amounts to punishment imposed against such an employee for no fault of his own. Therefore also, recovery order in question dated 5th May, 1991 itself is contrary to the settled principles of law laid down by the apex court and this court and, therefore, same is required to be quashed and set aside.

Therefore, considering the observations made by the division bench of this court in aforesaid decision as regards the principles of quantum merit and also considering the fact that such an extension was given by the district panchayat to the petitioner and it was not obtained by the petitioner from the district panchayat by playing any fraud or misrepresenting his case, and it is also not the case of the respondent authorities that such extension or reemployment has been obtained by the petitioner on the basis of some fraud or misrepresentation made by the petitioner, I am of the opinion that the respondents are not justified in recovering the amount in question from the petitioner for the period for which he had actually worked. In view of that, the order dated 30.5.91 passed by the DDO District Panchayat, Godhra as well as the order dated 2.5.1992 passed passed by the Additional Development Commissioner, State of Gujarat both orders are required to be quashed and set aside.

In the result, this petition is allowed. The order dated 30.5.91 made by the DDO, District Panchayat, Godhra as well as the order dated 2.5.92 made by the Additional Development Commissioner, State of Gujarat, Gandhinagar are hereby quashed and set aside. Consequently, Respondents No.3 and 4 are hereby directed to refund the said amount to the petitioner with interest thereon at the rate of 9 per cent per annum from the date of actual recovery made by the respondents till the actual payment thereof in full to the petitioner, within two months from the date of receipt of copy of this order. It is also directed to the Secretary, Panchayat and Rural Development Department, State of Gujarat to decide the application for post approval submitted by the District Panchayat, Godhra dated 29th October, 1993 if it is not so far decided by the said authority till this date within two months from the date of receipt of copy of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt.7.8.2003 (HK Rathod,J.)

Vyas